No. 78-1499

In the Supreme Court of the United States

OCTOBER TERM, 1978

PHILLIP MILESTONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A3-A4) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1979. A petition for rehearing was denied on March 2, 1979. The petition for a writ of certiorari was filed on March 31, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court properly ruled that, if petitioner took the stand, evidence of his prior conviction for tax evasion could be used to impeach his credibility.

2. Whether it was error to allow the jury to replay a tape recording in the jury room during its deliberations.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of bribing a federal official, in violation of 18 U.S.C. 201(b)(1) and 2.[1] He was sentenced to two years' imprisonment, fined $10,000, and disqualified from holding federal office. The court of appeals affirmed (Pet. App. A3-A4).

The evidence at trial showed that in 1975 petitioner had agreed to make monthly payments of $3,000 to the Internal Revenue Service in order to pay approximately $32,000 in taxes that he owed for 1971 and 1972 (Tr. 172-174).[2] In the spring of 1977, when petitioner was in arrears on his payments, Arnold Small, an officer with the Collection Division of the IRS, was assigned the delinquent tax account (Tr. 169-172). During this period, Internal Revenue

[1] Petitioner was acquitted on two other counts of bribery and one count of conspiracy. Co-defendant Henry Lipschutz, who pleaded guilty to bribery and conspiracy charges, testified on petitioner's behalf at trial.

[2] "Tr." refers to the transcript of the trial; "App." refers to petitioner's appendix in the court of appeals.

Agent Robert Mastrogiovanni was conducting an audit of petitioner's tax returns for 1974 and 1975 (Tr. 56-57). On November 16, 1977, petitioner gave Small $200 in exchange for reduction of the monthly payments on the delinquent account, as well as for Small's efforts on petitioner's behalf in seeking a satisfactory resolution of the tax audit (Tr. 245-246, 254-268; App. 12a-28a).

ARGUMENT

1. Petitioner contends (Pet. 4-10) that the district court erred in ruling that, if petitioner testified, his 1971 conviction for tax evasion could be used to impeach his credibility.

He argues that his tax evasion conviction was not admissible under Fed. R. Evid. 609(a)(2) because tax evasion is not a crime "involv[ing] dishonesty or false statement" (Pet. 6),[3] and that the conviction could not be admitted under Fed. R. Evid. 609(a)(1) because the probative value of admitting this evidence did not outweigh its prejudicial effect (Pet. 5). He

[3] Fed. R. Evid. 609(a) provides:

> **General rule.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

also contends that, even if the conviction was admissible under Rule 609(a)(2) as a crime involving dishonesty or false statement, the court should have excluded it under Fed. R. Evid. 403,[4] which, petitioner contends, provides residual authority to exclude unnecessarily prejudicial evidence (Pet. 6-10).[5]

But the evidence clearly was admissible under Rule 609(a)(2) as a crime involving dishonesty or false statement. As the Conference committee made clear:

> By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretence, *or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.*

H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 9 (1974) (emphasis added). And, as the Second Circuit has observed, "a crime which involves defrauding the revenue stands high in the category of crimes in-

[4] Fed. R. Evid. 403 provides in relevant part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice * * *.

[5] Petitioner claims prejudice (Pet. 5) because the crimes of tax evasion and bribery of a tax official both arose out of petitioner's continuing financial difficulties, and the conviction in one makes the charge in the other more plausible. He also complains that, because of the ruling, he did not testify, and as a result his version of the bribery meeting was not presented.

volving veracity." *United States* v. *Apuzzo*, 555 F.2d 306, 307-308 (2d Cir. 1977), cert. denied, 435 U.S. 916 (1978) (possession and transportation of untaxed cigarettes). See also *United States* v. *DeAngelis*, 490 F.2d 1004, 1009 (2d Cir.), cert. denied, 416 U.S. 956 (1974) (same offense); 3 *Weinstein's Evidence* ¶ 609 [03a], at 609-74 & n.6 (1978).

The evidence of petitioner's conviction was also independently admissible under Rule 609(a)(1), since the probative value of the evidence clearly outweighed the prejudice to petitioner. As the trial court noted (Tr. 21), a person who would make false statements to the government and attempt to defraud the revenue might also lie under oath. And even though tax evasion and bribery are in some respects similar, this is not sufficient reason, as petitioner contends, to preclude evidence of the tax evasion offense. See, *e.g.*, *United States* v. *Ortiz*, 553 F.2d 782, 784 (2d Cir. 1977). Indeed evidence of similar crimes is not considered overwhelmingly prejudicial in other contexts under the Federal Rules of Evidence, but can be admitted under Rule 404(b) to prove, for example, motive, opportunity, and intent, even when it cannot be used to prove character.

Finally, contrary to petitioner's contention, the trial court's ruling did not prejudice him by precluding him from challenging the government's version of the meeting at which he offered the bribe. To the contrary, a good quality tape recording of the conversation was introduced in evidence and the agent to

whom petitioner offered the bribe was available for cross-examination.

Petitioner contends, however, that this case raises the unsettled question [6] whether crimes involving dishonesty must be admitted under Rule 609(a)(2) regardless of their prejudicial effect, or whether the trial court retains authority under Rule 403 to evaluate the prejudicial impact of the evidence. While the legislative history of Rule 609 suggests that the question is easily answered,[7] it is not necessary to address it in this case. Since the trial court was uncertain whether it should evaluate the prejudicial impact of convictions involving dishonesty, the court conducted such a review in this case (see Tr. 516-

[6] See, *e.g.*, *United States* v. *Hayes*, 553 F.2d 824, 827 n.4 (2d Cir.), cert. denied, 434 U.S. 867 (1977); *United States* v. *Smith*, 551 F.2d 348, 358-359 n.20 (D.C. Cir. 1976)).

[7] The conference report on Rule 609(a)(2) leaves little doubt that the draftsmen's failure to mention evaluation of prejudice in Rule 609(a)(2), coupled with the express requirement to conduct such a review contained in Rule 609(a)(1), was intended to preclude consideration of prejudice where evidence of *crimen falsi* is at issue:

> The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.

H.R. Conf. Rep. No. 93-1597, *supra*, at 9.

517).[8] Therefore, petitioner has already received the consideration for which he is contending in this Court.

2. At trial, the government introduced into evidence a tape recording of the November 16, 1977, meeting between petitioner and Small.[9] During its deliberations, the jury asked to hear the recording again in the jury room because it believed the acoustics in "closer quarters" might be better than in the courtroom (Tr. 608). Petitioner objected and requested that the tape be replayed instead in open court (Tr. 610). Although the court agreed with petitioner that the transcript of the recording should not go to the jury, it granted the jury's request to replay the tape in the jury room (Tr. 612-613). Petitioner contends (Pet. 10-12) that the recording should have been replayed, if at all, only in open court and only a limited number of times.

It is within the trial court's discretion to decide whether evidentiary exhibits, including tape recordings, should accompany the jury to the jury room or whether the recordings should instead be replayed in open court. *United States* v. *Zepeda-Santana*, 569 F.2d 1386, 1391 (5th Cir.), cert. denied, 437 U.S. 907 (1978); *United States* v. *Alfonso*, 552 F.2d 605, 618-619 (5th Cir.), cert. denied, 434 U.S. 857 (1977);

[8] It is clear that the trial court did not refuse to consider prejudice to petitioner, since it expressly stated, after ruling, that it remained willing to reconsider the issue of prejudice as the trial progressed (*ibid.*).

[9] The conversation had been electronically monitored and recorded with Small's consent (Tr. 254).

United States v. *Stone*, 472 F.2d 909, 914 (5th Cir. 1973). Petitioner makes no showing that the court abused that discretion here. The tape, petitioner concedes (Pet. 10-11), was not confusing, but "audible and understandable," and it was sent to the jury in its entirety so that no particular portion received undue emphasis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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